

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
EASTERN - WATERLOO DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. CR 00-2020 MJM
vs.	)	
	)	<b>ORDER</b>
PAUL LLOYD KINGERY,	)	
	)	
Defendant.	)	

The matter before the Court is the defendant's motion for new trial based upon newly discovered evidence (doc. no. 51). The Court held two evidentiary hearings on the motion and now enters this Order denying the motion for new trial.

The motion for new trial is based upon the allegation that subsequent to the defendant's trial, the defendant learned that one of the witnesses who testified against him, Joe Luna, told two inmates at the Linn County Correctional Facility that he had given fabricated testimony. Specifically, the two individuals indicated that Mr. Luna said he testified against a person he didn't even know. The two individuals to whom the statements were allegedly made were Joe Scalero and Ted Blanchett. Both of those individuals testified at the hearing on the motion for new trial, as did Mr. Luna.

Federal Rule of Criminal Procedure 33 provides that a district court has broad discretion to grant a motion for a new trial "if required in the interest of justice."

Fed.R.Crim.P. 33. One circumstance in which the “interest of justice” may require a new trial is when new evidence is discovered after the trial was completed that is material to the defense and that would likely produce an acquittal if a new trial were granted. See United States v. Warren, 140 F.3d 742, 74-45 (8<sup>th</sup> Cir. 1998), citing United States v. Willis, 89 F.3d 1371, 1380 (8<sup>th</sup> Cir.), cert. denied, –U.S.–, 117 S.Ct. 273 (1996). This “newly discovered evidence” must have truly been discovered after trial, and the failure to discover that evidence must not have been attributable to a lack of diligence by the movant. Warren, 140 F.3d at 744-45, citing Willis, 89 F.3d at 1380. In addition, the evidence which has been discovered must not be merely cumulative or impeaching. Id. The defendant maintains that the information provided by Joseph Scalero and Ted Blanchett is “newly discovered evidence” which warrants a new trial.

The Court agrees that the testimony is “newly discovered.” However, for the reasons stated below, this Court concludes that the newly discovered evidence would not likely result in an acquittal and that the motion for new trial should be denied.

In order to put the case in some context, the Court will briefly describe the testimony which is the subject of the motion for new trial. The defendant was charged with three counts, one count of conspiracy to distribute methamphetamine and marijuana, one count of possession of firearms by a user of controlled

substances, and one count of possession of a destructive device (pipe bomb).<sup>1</sup> Two witnesses, including a woman with whom the defendant lived, Lisa Wells, testified about the defendant's involvement in manufacturing and distribution of relatively small amounts of methamphetamine. In addition, a search warrant executed at the residence of the defendant and Lisa Wells found small amounts of marijuana and methamphetamine, which to some extent, corroborated the manufacturing allegations.

The witness, Joseph Luna, testified that Lisa Wells was a drug user and one of Luna's customers. He also testified that on one or two occasions he purchased small quantities of methamphetamine from Paul Kingery while at the Wells/Kingery residence. Defense counsel did a very good job impeaching Mr. Luna's testimony. In addition, Lisa Wells testified that she could not recall ever seeing Paul Kingery sell drugs to Mr. Luna (although she did testify about Mr. Kingery's other manufacturing and distribution activities).

Joe Scalero testified at the hearing on the motion for new trial that he had a conversation with Luna in which Luna said that he was in the Linn County Jail to

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<sup>1</sup>The challenged testimony of Mr. Luna went only to the first count. Even if the Court were inclined to grant the new trial, it would only be as to the drug conspiracy count. The independent evidence of Mr. Kingery's guilt as to the other two counts is overwhelming. Even if Mr. Luna's testimony was totally stricken, the stricken testimony would have no spill over effect as to the weapons and explosive devices count.

testify against someone he didn't know, and had never done business with. Scalero said that an individual by the name of "Blanch" was present. The individual known as "Blanch" was determined to be Timothy Blanchett, who then testified at a subsequent hearing. Mr. Blanchett testified that he overheard the conversation that Mr. Scalero referred to and recalls hearing Mr. Luna say that he did not know the person he testified against. Mr. Luna testified at the hearing on the motion for new trial to the effect that while in the Linn County Jail, he heard a number of people comment about the fact that he was a cooperator. He denies telling Scalero that he testified falsely, but he does admit he lied to Scalero and told Scalero he was not cooperating, and had nothing to say about Mr. Kingery.

The conflict in this case was not unlike a trial and subsequent motion for new trial which the undersigned presided over a few years ago. See, United States v. Womack, 191 F.3d 879 (8<sup>th</sup> Cir. 1999). As in Womack, there are allegations that fellow inmates at the local correctional facility heard conversations indicating that cooperating witnesses had fabricated their testimony. As in the Womack case, in evaluating credibility, this Court is very interested in knowing when a cooperating witness first made statements about the person against whom they are testifying. In other words, were Joe Luna's statements about Mr. Kingery something that was told to law enforcement on the eve of Kingery's trial, or was it something that had been part of the initial debriefings in Luna's case.

The evidence shows that Mr. Luna was debriefed on June 1 and June 8, 2000, approximately three months in advance of Kingery's indictment. At those debriefings, Mr. Luna made statements consistent with the testimony he gave at Mr. Kingery's trial. Specifically, Mr. Luna was asked about Lisa Wells. Mr. Luna admitted that Lisa Wells was a customer of his and indicated that she lived on a farm with an older man named Paul (last name unknown). In addition to being debriefed about Lisa Wells's purchases, Luna stated in his initial debriefings that he had gotten methamphetamine from Paul two times for a total of one-quarter to one-half ounce. Consistent with Mr. Luna's testimony at trial, Mr. Luna stated in his debriefing that he purchased the methamphetamine from Paul because it was of good quality and was for Luna's own personal use.

These statements made to law enforcement three months before Kingery was indicted is entirely consistent with the testimony Mr. Luna gave at the Kingery trial. It should also be noted that Mr. Luna testified about a number of customers and other individuals who are involved in the methamphetamine trade. There is nothing about the debriefings that would indicate Mr. Kingery was in any way singled out or made a target of Luna's cooperation. In fact, Luna indicated that he did not even know Mr. Kingery's last name.

The fact that Luna gave statements about Mr. Kingery's drug involvement three

months prior to Mr. Kingery's indictment is a strong corroboration of Luna's testimony at the motion for new trial hearing. It also contradicts Mr. Scalero's testimony in which Mr. Scalero was quite emphatic that Mr. Luna said he had never met the person and didn't know the person he testified about. Likewise, it contradicts Timothy Blanchett's testimony that Luna did not know the person against whom he testified. It is this Court's conclusion that either Scalero and Blanchett are lying about Luna's statements because of their dislike of cooperators, or they misinterpreted Luna's denials of his cooperator status in such a way as to misinterpret his statements to mean that Luna did not know the defendant, Kingery. In any event, the Court concludes that the testimony of Mr. Scalero and Mr. Blanchett is not credible and does not warrant the granting of a new trial.

Even if the Court were to conclude that the Luna testimony should be stricken as a recent fabrication, there is no reasonable likelihood that there would be an acquittal. As indicated previously, the Luna testimony only went to the drug count and had no effect upon the gun count or explosive devices count. Even as to the drug count, however, Mr. Luna was a peripheral witness who was substantially discredited by his cooperator status and desire for a sentence reduction. The main witnesses against defendant Kingery were Lisa Wells and Brad Sabbann. Their independent testimony, together with the results of the search warrant, were more than sufficient to result in a conviction of Mr. Kingery.

**ORDER**

IT IS THEREFORE ORDERED the motion for new trial is denied. The Court will set the sentencing of Mr. Kingery by separate notice.

Done and Ordered this 24th day of October, 2001.

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Michael J. Melloy, Judge  
UNITED STATES DISTRICT COURT